FILED
SEP 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-963.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Petitioner.

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Questions Presented.

Whether the Fourth Amendment to the United States Constitution requires inflexible application of the exclusionary rule when a police officer has reasonably and in good faith relied upon a search warrant to seize items specified in his application for the warrant, but where the warrant is subsequently invalidated for judicial error in failing to specify the items in the warrant itself?

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Opinion Below.

The opinion of the Supreme Judicial Court is reported at 387 Mass. 488, 441 N.E.2d 725 (1982).

Jurisdiction.

The judgment of the court below was entered on October 26, 1982. The petition for a writ of certiorari was filed on

December 4, 1982, and was granted on June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions Invoked.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment.

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Prior Proceedings.

On May 14, 1979, Osborne Sheppard was indicted by a Suffolk County grand jury in the Commonwealth of Massachusetts for murder in the first degree (Joint Appendix 8a).[1] Prior to trial, Sheppard moved to suppress certain physical evidence seized pursuant to a search warrant (J.A. 10a). After a pretrial hearing, the court filed a memorandum containing findings of fact and rulings of law denying the motion (J.A. 19a).

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[1] Hereinafter "J.A."

After trial by jury, the respondent was found guilty of murder in the first degree and sentenced to life imprisonment (J.A. 6a).

On appeal, the Supreme Judicial Court of the Commonwealth reversed the conviction, the plurality holding, "we conclude, on the basis of opinions of the Supreme Court . . . that the exclusionary rule requires the suppression of the evidence seized [pursuant to this defective warrant.] *Commonwealth* v. *Sheppard*, 387 Mass. 488, 507 (1982) (J.A. 59a).

Statement of the Facts.

The facts surrounding the discovery of the body and the investigation which resulted in the police seeking a search warrant are comprehensively set out in the opinion of the Supreme Judicial Court. (387 Mass. at 489-496 (J.A. 41a-48a).) Since the sole issue presented concerns only the application for, issuance of, and execution of a search warrant, and not the establishment of probable cause, reiteration of the facts will be limited to those circumstances.

At the hearing on the motion to suppress, the following facts were elicited: the badly burned and beaten body of the victim, later identified as Sandra Boulware, was discovered in a vacant lot in the Roxbury area of Boston at approximately 5:00 A.M. on Saturday, May 5, 1979 (Tr. 2:170). A length of wire was attached to one leg of the corpse. (Memorandum Containing Findings of Fact and Rulings of Law,[2] J.A. 20a.) Intensive investigation subsequently led to the identification of the victim and to the identification of Osborne "Jimmy" Sheppard as a boyfriend of the deceased (Findings, J.A. 21a). A-

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[2] Hereinafter "Findings".

police officer who knew Sheppard from prior occasions located him and Sheppard voluntarily accompanied him to the police station. (J.A. 21a.)

After interviewing Sheppard and other individuals whom he had stated he was with from Friday night, May 4, to the early morning hours of May 5, several contradictions in Sheppard's statement appeared (Findings, J.A. 27a). The police then learned that Sheppard had borrowed an automobile between 3:00 A.M. and 5:00 A.M. on May 5, 1979. With the owner's permission, the automobile was inspected and bloodstains were found in the trunk compartment and on the bumper. Strands of wire were also found within the trunk. On Sunday morning the owner told the police that shortly before he let Sheppard use the car he placed a box of apples in the trunk and that there were no stains in the trunk or on the bumper at the time (J.A. 24a). At approximately noontime on Sunday, May 6, 1979, Detective O'Malley prepared an affidavit in support of an application for a search warrant (Tr. 1:38-39 (J.A. 14a)). No courts were open on Sunday afternoon and efforts to locate clerks of the Roxbury District Court were unsuccessful (Tr. 1:64-65; Findings, J.A. 25a). Detective O'Malley's attempts to obtain proper warrant forms from other districts were equally unsuccessful (Tr. 1:55).

Finally, Detective O'Malley was able to obtain a warrant form entitled "Search Warrant" and subtitled "Controlled Substance G.L. c. 276 §§1-3A" from the Dorchester District Court (Tr. 1:39; J.A. 25a). Detective O'Malley, aware that this warrant form related to a search for controlled substances, attempted to adapt the form for the needed use.

With a typewriter he "x"ed out the words "CONTROLLED SUBSTANCES" over the cover side of the form; and the word "DORCHESTER" on the face side and typed in the words

"ROXBURY," so that the application was addressed "To the Justices of the Municipal Court of the ROXBURY DISTRICT."

O'Malley further typed in the name "Osborne Sheppard" where a blank space was afforded for use in identifying the "keeper" or "depositor" of the controlled substance that the form as printed contemplated. O'Malley also typed in "2nd & basement" in a blank space provided for place sought to be searched; also "42 Deckard St." in the blank space provided for specification of the premises (Tr. 1:43; Findings, J.A. 26a).

Arrangements were then made for Detective O'Malley to present the affidavit to a judge of the South Boston District Court at the judge's home. Detective O'Malley, accompanied by other officers and members of the District Attorney's office arrived at the judge's home at approximately 2:45 P.M. (Tr. 1:39, 60, 65; Findings, J.A. 26a).

O'Malley presented the affidavit, swore to its truth, and signed it before the judge (Tr. 1:40-43, 69-70; Findings, J.A. 26a). The affidavit recited the following facts:

> On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Boulware was found beaten and burned to death opp. [*sic*] 28 Hazelwood St. Rox. in a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation that followed, it was determined that one Osborne Sheppard, 42 Deckard St. Rox. was the last person to have been seen with Sandra. In an interview gave [*sic*] to Sgt. Bornstein O. Sheppard stated that he and Sandra went to Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickel bags of herb and a fifth of Amaretto liquor. Officers in this investigation have established that O. Sheppard in possession of a 1975 blk. Ford Thunderbird. Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found.

> And that this article was found to have human blood on the rear bumper that was'nt [*sic*] there prior his taken possession [*sic*]. Also in the trunk of this car were found various pieces of wire and rope that may have been use [*sic*] to bind parts of her body, pieces of wire were found on the body. O. Sheppard has told Mc Kinnley [*sic*] Grimes, a friend, that in the past he has taken woman [*sic*] friends to his celler [*sic*] at 42 Deckard St. for social purposes, and has worked on the cellar to make it comfortable.

(J.A. 14a-15a.)

The affidavit listed as the items sought:

> A fifth bottle of Amaretto liquor, 2 nickle bags marijuana, a womans [*sic*] jacket that has been described as black-grey (charcoal) any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, mens [*sic*] or womans [*sic*] clothing that may have blood, gasoline, burns on them. Items that may have fingerprints of the victim.

(J.A. 15a.)

Detective O'Malley then explained to the judge the unsuccessful attempts that had been made to locate an appropriate search warrant form. The judge searched in his own library for an appropriate form (Tr. 1:45-46, 55). Detective O'Malley showed the judge the controlled substance search warrant form which O'Malley had attempted to alter to fit the circumstances. The judge examined the proffered form and made

additional alterations to it (Tr. 1:43-44; Findings, J.A. 27a). On the face side of the warrant the judge crossed out with a pen the name of the Chief Justice of the Dorchester Court, which name appeared in the attestation clause and crossed out the printed word "Dorchester" in the clause, and substituted his own name and the name of the court of the jurisdiction in which the warrant was sought ("Mass. Trial Court, Roxbury Division") respectively. On the cover side he struck the words "Dorchester District" and substituted "Roxbury Division Mass. Trial Court," and dated and signed the warrant (Findings, J.A. 27a).

Detective O'Malley also sought and secured a warrant for the arrest of Osborne Sheppard (Tr. 1:47). The team executing the search warrant made a peaceful entry into 42 Deckard Street at approximately 5:00 P.M. Detective O'Malley, carrying the affidavit and search warrant, spoke with two female relatives (apparently the mother and sister) of the defendant. He informed them orally that he had a search warrant and explained that other officers were presently on their way to arrest Osborne Sheppard (Tr. 1:49-50, 97-99; Findings, 28a).

The second floor bedroom of the defendant was searched and bloodstained boots and jacket were seized. (Tr. 9:1234, 1297, 1300, 1315).

Detective O'Malley went to the basement of the house where he observed what appeared to be blood stains on the concrete floor near the doorway which led from the finished to the unfinished area. Under a mat on the floor was a piece of plywood. Under the plywood were two women's earrings, the larger of which appeared to have a blood stain on it. Detective O'Malley chipped off pieces of the stained concrete (Ex. 48A and 48B; Tr. 1:52-54; 8:1072-1081). The detective then entered the unfinished section of the basement. He observed a recent excavation. In the excavation he found a pair of men's jockey shorts, a pair of women's black leotards or panty hose, a

patch of hair which appeared to be part of a hair piece, a piece of tile with a red stain on it and a section of insulated wire (Tr. 1:52; 8:1082-1087, 1091, 1093, 1119). Two other pieces of wire were seized in the unfinished area. An envelope which appeared to have blood stains on it was seized from the finished area of the basement by the pool table (Tr. 8:1088, 1090). The trial judge found that "the search was within the limits that O'Malley understood the warrant to permit" (Findings, J.A. 28a). O'Malley made his return to the Roxbury Court on Monday morning (Findings, J.A. 28a).

Summary of the Argument.

The Fourth Amendment neither directly nor implicitly requires the exclusion of illegally seized evidence from criminal trials. The exclusionary rule was created within the context of flagrant police disregard of Fourth Amendment protections. *Weeks* v. *United States*, 232 U.S. 383 (1914), and *Mapp* v. *Ohio*, 367 U.S. 643 (1961). This Court has consistently re-examined and re-evaluated the rationales originally thought to support application of the rule and found that the sole remaining justification for application of this judicially created remedy is that it may deter improper police conduct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338 (1974) (pp. 10-12).

In defining the scope of the rule, whether to accord it retroactive application or to extend its application beyond the suppression of evidence directly at trial, the Court has developed a balancing test, that is, when the cost of applying the rule is found to outweigh the possible deterrent effect of application of the rule, the rule will not be imposed. See, *e.g.*, *United*

States v. *Peltier*, 422 U.S. 531 (1975); *Calandra*, *supra*, 414 U.S. 338 (1974) (pp. 12-23).

A "reasonable good faith" exception to application of the exclusionary rule under the circumstances of the instant case is consistent with the analytic framework developed by this Court. Application of the rule where, as here, the police in good faith have obtained a search warrant issued by a magistrate after a determination that probable cause exists, can have no deterrent effect for the police have already acted in an objectively reasonable manner. Suppression of evidence solely because of a negligent mistake of the magistrate can not logically be held to have deterrent value. Rather, it offends those principles of proportionality necessary to an orderly system of justice and serves no legitimate function (pp. 23-28).

In the alternative, it is suggested, that where the police obtain a search warrant for which probable cause exists, and where the only defect results from the magistrate's negligent failure to adapt the warrant form to include the items specified by the police in their affidavit, as those to be seized, the search and seizure is not "unreasonable" and therefore no violation of the Fourth Amendment has occurred (pp. 28-32).

Argument.

I. The Fourth Amendment does Not Require Application of the Exclusionary Rule Where a Police Officer Reasonably and in Good Faith Obtains a Search Warrant Which is Later Invalidated for Judicial Error.[3]

A. *The Exclusionary Rule is Not Constitutionally Mandated.*

The Fourth Amendment by its terms neither explicitly nor implicitly requires the exclusion of evidence. Unlike the Fifth Amendment which explicitly prohibits the compulsion of testimony in a criminal case, the text of the Fourth Amendment is conditional. Only unreasonable searches fall within the proscription of the Fourth Amendment and no reference is made concerning any remedy for its violation.

In 1914, this Court in *Weeks* v. *United States*, 232 U.S. 383 (1914), first fashioned the exclusionary rule and applied it to the federal system. *Weeks* involved successive, warrantless searches of a home and seizure of books, letters and personal documents by a federal official.

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[3] In the court below the Commonwealth argued, and the court considered, the question of whether the exclusionary rule requires suppression of evidence obtained in the course of a search conducted in good faith reliance upon a warrant issued upon probable cause but later invalidated for failure to satisfy the particularity requirement of the Fourth Amendment. The court concluded, "solely on the basis of the opinions of the Supreme Court of the United States" (*Commonwealth* v. *Sheppard* at 489 (J.A. 41a)), that the exclusionary rule required suppression. The decision below is based solely upon the exclusionary rule as enunciated by this Court. Neither art. 14 of the Declaration of Rights of the Constitution of the Commonwealth, nor Mass. Gen. Laws c. 276, § 2 require exclusion of evidence seized in violation of their particularity requirements. See *Commonwealth* v. *Spofford*, 343 Mass. 703 (1962). *Commonwealth* v. *Wilkins*, 243 Mass. 356 (1923).

It is suggested that this Court acted in its supervisory capacity to prohibit the use of illegally seized evidence in a federal court. The rationale for the decision is linked to the Fourth Amendment,

> [T]he protection of the Fourth Amendment declaring [a] right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

232 U.S. at 393-394.

The Court, however, relied upon *Boyd* v. *United States*, 116 U.S. 616 (1886), in which the Court had struck down a statute requiring a person to produce any document which, in a non-criminal action, might tend to prove a violation of the revenue laws. The Court reached its decision by grouping together the Fourth and Fifth Amendments because "the seizure of a man's private books and papers against him is [not] substantially different from compelling him to be a witness against himself." *Id.* at 633.

In *Wolf* v. *Colorado*, 338 U.S. 25 (1949) the Court held for the first time that the core protection of the Fourth Amendment — "the security of one's privacy against arbitrary intrusion by the police" was "implicit in 'the concept of ordered

liberty' and as such was enforceable against the states through the Due Process Clause" of the Fourteenth Amendment. 338 U.S. at 27-28.

However, the Court did not consider the exclusionary rule so essential to the Fourth Amendment as to require its application in state criminal proceedings. The Court viewed the rule as not derived from explicit requirements of the Fourth Amendment, but rather, to be "a matter of judicial implication." 338 U.S. at 28.

In 1961, the Court reversed that portion of *Wolf*, and extended application of the exclusionary rule to state criminal trials under the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The plurality opinion implied that the exclusionary rule was a necessary corollary of the Fourth Amendment (367 U.S. at 655-657), but Justice Black, concurring, retained the position that the exclusionary rule could be justified only by reading the Fourth Amendment in conjunction with the Fifth Amendment. *Id.* at 661. Recently, this Court has specifically rejected the proposition that the Fourth Amendment mandates exclusion of evidence as a necessary corollary to Fourth Amendment guarantees. "We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right. . . ." *Stone* v. *Powell*, 428 U.S. 465, 495 n.37 (1976). See also *United States* v. *Calandra*, 414 U.S. 338 (1974).

B. *The Rationales Supporting Application of the Exclusionary Rule do Not Preclude Recognition of a Good Faith Exception.*

At the outset it should be noted that the original creation of the exclusionary rule and its first application to the States occurred in cases involving flagrant abuses of not only the Fourth

Amendment but of the First Amendment as well.[4] Of the original three rationales put forth to justify application of an exclusionary rule as a remedy for Fourth Amendment violations, the need to protect the right to privacy, preservation of judicial integrity and deterrence, none, as recently interpreted by this Court, would preclude recognition of a good faith exception to the application of that rule.

1. Right to Privacy.

In *Weeks* and *Mapp*, in the face of flagrant, unlawful, warrantless seizures of personal papers and literature, the Court held that in order to redress an invasion of privacy, evidence must be excluded. *Weeks*, 232 U.S. at 393; *Mapp*, 367 U.S. at 660. However only four years after *Mapp*, the Court, in declining to grant *Mapp* retroactive application, virtually repudiated the privacy right rationale. "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965).[5]

In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court expressly rejected the individual privacy rationale, stating,

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[4] Indeed, *Mapp* was granted certiorari on the First Amendment issue. The exclusionary rule issue was raised only by amicus curiae in asking the Court to re-examine *Wolf*. *Mapp* v. *Ohio*, 367 U.S. 643, 674 n.5 (Harlan, J., dissenting).

[5] The right to privacy is not an absolute, and falls by the terms of the Fourth Amendment before a reasonable search. Moreover, the exclusionary rule as a remedy for invasion of privacy is totally inadequate as it affords no remedy whatsoever to those innocent persons whose privacy has been invaded. See M.R. Wilkey, The exclusionary rule: why suppress valid evidence?, 62 Judicature 215, 233 n.3 (1978). Those persons have available redress through 42 U.S.C. § 1983 (1964) against individual officers or municipalities whose local ordinances, regulations, policies or customary practices result in the commission of constitutional torts. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). Those entities enjoy no immunity defense. *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

"the rule [was] a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" 414 U.S. at 348.

2. Judicial Integrity.

The judicial integrity rationale was first clearly stated in *Weeks*:

> [T]he duty of giving [Fourth Amendment protections] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution. . . .

Weeks, 232 U.S. at 392.

This institutional concern with maintaining the purity of the judicial system was also central to the plurality opinion in *Mapp* which viewed application of the exclusionary rule as guaranteeing to the courts "that judicial integrity so necessary to the true administration of justice." *Mapp*, 367 U.S. at 660.[8] However, in *Linkletter*, no mention was made of the judicial integrity rationale as mandating or supporting retroactive application of the exclusionary rule, rather, institutional considerations of the adverse impact on the administration of justice supported the contrary conclusion. *Linkletter* at 637.

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[8] The plurality opinion also relied heavily on an empirical basis for extending the rule to the States, *i.e.*, that it had proved to be the only effective means of enforcing the Fourth Amendment. *Mapp*, 367 U.S. at 655-660.

Not only has the "imperative of judicial integrity" not served as an independent basis for a decision in any case, (Oaks, Studying the Exclusionary Rule in Search and Seizures, 37 U.Chi.L. Rev. 665, 669 (1970)), the force of this rationale has been eroded by permitting the collateral use of unlawfully seized evidence and use of live evidence derived from an unlawful search. See, *e.g.*, *United States* v. *Havens*, 446 U.S. 620 (1980) (illegally seized evidence may be used for impeachment); *United States* v. *Janis*, 428 U.S. 433 (1976) (evidence illegally seized in a criminal investigation, admissible in civil tax proceeding); *United States* v. *Calandra*, 414 U.S. 338 (1974) (illegally seized evidence admissible in grand jury proceedings); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (live testimony derived from an unconstitutional search is admissible at trial). Were the "judicial integrity" rationale to have been applied in a logically consistent manner, the Court would have been required to prohibit such usage. Consistent application would also require the Court to abandon the threshold standing requirement for invoking the exclusionary rule which was enunciated in *Rakas* v. *Illinois*, 439 U.S. 128 (1978). For, the integrity of the judicial system is not conditioned upon whose rights were infringed, but whether tainted evidence is admitted into evidence. See also *United States* v. *Payner*, 447 U.S. 727, 735 (1980).

To the extent that the "judicial integrity" rationale has continued viability, a good faith exception is not inconsistent. In *United States* v. *Peltier*, 422 U.S. 531, 538 (1975), this Court recognized that the imperative of judicial integrity

> is . . . not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution. (Emphasis in original.)

Before exploring the status of the deterrent rationale for the exclusionary rule, two additional comments on the concept of judicial integrity are appropriate. Assuming that the trial of a criminal case is a search for the truth, it is difficult to determine how the integrity of the judiciary is compromised by the admission of inherently reliable evidence. Rather, it is suggested, indiscriminate suppression of reliable, trustworthy and probative evidence may well have the opposite effect of generating disrespect for the law and the judicial system. See *Illinois* v. *Gates*, ___ U.S. ___, 103 S. Ct. 2317, 2342 (1983) (White, J. concurring); *Stone* v. *Powell*, *supra*, 428 U.S. at 490 (Burger, C.J.). In any event, it is suggested that the judicial integrity rationale is fully served by the policy of deterrence.

In *Janis*, *supra*, the Court stated:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

428 U.S. at 458-459 n.35.

3. Deterrence.

The deterrence rationale was succinctly stated in *Elkins* v. *United States*, 364 U.S. 206, 217 (1960): "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it."

However, limitations on the effectiveness of the rule as a deterrent were early recognized. Chief Justice Warren, writing for the Court in *Terry* v. *Ohio*, 392 U.S. 1, 13 (1968), noted:

> The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent.

The Court has continued to acknowledge the limitations of the rule and to balance the costs of deterrence against the integrity of the fact finding process. In his dissenting opinion in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971), Chief Justice Burger, in addition to presenting forceful criticisms of the exclusionary rule, drew a distinction between intentional, flagrant conduct and inadvertent errors of judgment as causes of Fourth Amendment violations and lamented the rigid mechanistic application of the exclusionary rule to both. *Bivens* at 418.

This more reasoned balancing approach has been reflected in recent decisions of the Court. In *United States* v. *Calandra*, 414 U.S. 338 (1974), in refusing to extend application of the exclusionary rule to grand jury proceedings, the Court utilized a balancing approach:

> [T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

414 U.S. at 348 (footnote omitted). See also *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

Continuing to assess the efficacy of the exclusionary rule in deterring Fourth Amendment violations, the Court in *United States* v. *Peltier*, 422 U.S. 531 (1975),[7] stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

Id. at 542.

To have ruled otherwise the Court would have, in substance, told law enforcement that it could not rely on any judicial decision other than those of the Supreme Court. *Id.* at 541-542. Similarly, in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), the Court refused to require suppression of evidence seized incident to an arrest pursuant to an ordinance later declared unconstitutional. The Court refused to require that the "prudent officer" anticipate a subsequent judicial determina-

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[7] The Court declined to grant *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (enunciating new Fourth Amendment standards involving roving border patrol searches) retroactive effect.

tion that the ordinance was unconstitutional. While the decisions in *Peltier* and *DeFillippo* did not actually modify the exclusionary rule, the Court's reasoning does lay the groundwork for such modification.

Within this background, it is suggested that explicit adoption of a good faith exception to the exclusionary rule is entirely consistent with the developing exclusionary rule jurisprudence. A majority of the court has consistently adopted an analytic framework for applying the exclusionary rule which includes consideration of the efficacy of the rule in effectuating its deterrent purpose and the concept of proportionality.[8]

> Application of the [exclusionary] rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

Stone v. *Powell*, 428 U.S. 465, 490 (1976) (Burger, C.J., concurring) (footnote omitted).

This Court has also recognized that the cost of applying the rule is substantial. "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept

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[8] The lack of proportionality often attendant to rigid adherence to the exclusionary rule is striking. See, *e.g.*, *United States* v. *Shorter*, 600 F.2d 585 (6th Cir. 1979) (suppression of evidence of a bank robbery ordered, because the magistrate failed to administer an oath to the affiant "immediately" at the beginning of his telephonic application for a search warrant, as required by Fed. R. Crim. P. 41(c)(2)(D), despite a clear demonstration of probable cause).

from the trier of fact and the search for truth at trial is deflected." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 137.[9]

Assuming that there is, in some situations, a deterrent effect in applying the rule,[10] logic dictates that there would be no effect where the police officer acted in an objectively reasonable belief that his conduct was lawful.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Michigan v. *Tucker*, 417 U.S. 433, 447 (1974). See also *United States* v. *Janis*, 428 U.S. at 459 n.35. ("[T]he officers here were clearly acting in good faith . . . a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion.") Logically, the deterrent value of the

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[9] A recent California study found that 4.8% of more than 4,000 felony cases were declined for prosecution because of search and seizure problems. Prosecution was declined in approximately 30% of all drug arrests for the same reason. National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982).

[10] The statistical data assembled lends no empirical proof to either substantiate or refute the proposition that the rule operates effectively to deter police misconduct. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). The Court has recently noted the absence of any meaningful data. *Janis*, *supra*, 428 U.S. at 449-453; *Stone* v. *Powell*, *supra*, 428 U.S. at 492; *id.* at 498, 499 (Burger, C.J., concurring).

rule would have the greatest effect where police officers acted in conscious disregard of settled principle of law or under circumstances "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring). Given this view of the deterrence rationale it is submitted that the Court should explicitly modify the exclusionary rule.

C. *The Exclusionary Rule Should Not be Applied where Police Officers Act in a Reasonable Good Faith Belief that their Conduct Comports with the Fourth Amendment.*

The Commonwealth urges the Court to adopt the suggestion first made by Justice White in *Stone* v. *Powell*, 428 U.S. at 538 (White, J., dissenting,) that:

> [T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. . . .

and most strongly urged in concurrence in *Illinois* v. *Gates*, *supra* at 103 S.Ct. 2240. Justice White's proposal is consistent with concerns expressed by other members of the Court.[11]

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[11] See generally, *Stone* v. *Powell*, *supra*, 428 U.S. at 501 (Burger, C.J., concurring); *Brown* v. *Illinois*, *supra*, 422 U.S. 590, 612 (1974) (Powell, J., concurring in part); *United States* v. *Janis*, 428 U.S. 433, 453 (1976); *California* v. *Minjares*, 443 U.S. 916 (1979) (Rehnquist, J., with Burger, C.J., dissenting from the denial of stay).

The Fifth Circuit has already adopted such an exception, *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1127 (1981).[18]

In *Williams*, a Drug Enforcement Administration agent arrested an individual that he knew was violating a travel restriction which had been placed upon her when she was released on appeal of another conviction. A subsequent search of her person incident to arrest revealed quantities of heroin. It was later determined that the defendant's violation of the travel restriction did not constitute a crime.

In adopting a reasonable good faith exception, the Fifth Circuit delineated two categories in which the exception was applicable: "good faith mistake," an action under a reasonable factual error, and a good faith "technical violation" in which an officer has reasonably relied upon a statute later declared unconstitutional or a warrant which is later invalidated. *Williams, supra* at 841 and 846. While the Second Circuit has specifically rejected such an exception, *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 428 U.S. 910 (1976), a number of state courts have also adopted a good faith exception. In *People* v. *Adams*, 53 N.Y. 2d 1, 412 N.E. 2d 537 (1981), the New York Court of Appeals recognized an exception for a good faith reliance upon a consent to search, and emphasized that "the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers. *Id.* at 9. See also *State* v. *Mincey*, 130 Ariz. 389, 636 P.2d 637 (1981) (good faith reliance on the law in Arizona as interpreted by a legal expert); *State* v. *Lehnen*, 403 So. 2d 683, 686 (La. 1981) (material facts, inadvertently but in good faith,

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[18] Apparently the Eleventh Circuit has also adopted such an exception, *Bonner* v. *Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

omitted from affidavit in support of search warrant); *People* v. *Pierce*, 88 Ill. App. 3d 1095, 411 N.E. 2d 295 (1980) (invalid search warrant, but probable cause and police conduct neither flagrant nor conscious); *Richmond* v. *Commonwealth*, 50 U.S.L.L. 2162 (Ky. Ct. App. 1981) (suppression not required where officers relied in good faith upon a technically defective search warrant).[13]

It is, therefore, suggested that the Court reject the inflexible *per se* application of the exclusionary rule and adopt an objective test which focuses upon the reasonableness of a police officer's conduct in his good faith attept to comply with the standards of the Fourth Amendment.

II. A Good Faith Exception to Application of the Exclusionary Rule is Most Appropriate Where the Search has been Conducted Pursuant to a Warrant.

As noted by Justice White, this Court has "never set forth a rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant. . . ." (*Gates*, 103 S.Ct. at 2344 (White, J., concurring)). One would be hard put to supply one in light of the fact that "once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Stone* v. *Powell*, 428 U.S. at 498 (Burger, C.J., concurring).

The Commonwealth, therefore, suggests that modification of the exclusionary rule under the particular circumstances of this case would not only be consistent with recent developments of exclusionary rule jurisprudence, but would also com-

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[13] Colorado has enacted a good faith exception. Colo. Rev. Stat. Tit. 16, Art. 3, § 308. The United States Congress is considering a similar enactment. See the Exclusionary Rule Bills, Hearings Before the Subcommittee on Criminal Law of the Senate Judiciary Committee, 97th Cong.; 1st and 2d Sessions.

port with the "concept of proportionality essential to the concept of justice." In the instant case, the exclusionary rule has been applied to suppress evidence obtained pursuant to a search warrant. There is no dispute as to the sufficiency of the probable cause to support issuance of the warrant. Thus the strong preference implicit in the Fourth Amendment for searches and seizures conducted pursuant to a warrant issued upon a finding of probable cause has been met. See *United States* v. *Ventresca*, 380 U.S. 102 (1965). The conduct of the police in securing and executing the warrant has been scrupulously examined. The court below specifically found that the police conduct was proper, that they had probable cause to search the premises and that their affidavit adequately set forth that probable cause and specified the items to be seized. The police were advised by the judge that the warrant was adequate to justify the search of the designated premises for the items specified in the application. The search was conducted "in a manner consistent with their good faith belief that a proper warrant had been issued." *Commonwealth* v. *Sheppard* at 503 (J.A. 55a).

> In short, the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge. The defect in the warrant was not harmful to the defendant in the circumstances of the actual search. The search was conducted in the same way and with the same results as it would have been if the warrant had not been defective. (Footnote omitted.)

Thus, it appears that the police conduct in applying for and executing the warrant was entirely reasonable. "A warrant issued by a magistrate normally suffices to establish" that a

law enforcement officer has "acted in good faith in conducting the search." *United States* v. *Ross*, 456 U.S. 798, 823 n.32 (1982).

The warrant was subsequently invalidated for a technical defect, a negligent error committed by the magistrate in not specifying the items to be seized as required by the particularity requirement of the Fourth Amendment.[14] As suggested by Justice White concurring in *Illinois* v. *Gates*:

> Excluding evidence for these reasons can have no possible deterrent effect on future police conduct, unless it is to make officers less willing to do their duty. Indeed, applying the exclusionary rule to warrant searches may well reduce incentives for police to utilize the preferred warrant procedure when a warrantless search may be permissible under one of the established exceptions to the warrant requirement.

Gates at 2345 (White, J., concurring).[15]

Here, the warrant was invalidated because of an error of the judge. It is quite clear that the exclusionary rule was adopted

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[14] Petitioner in no sense seeks to minimize the fundamental importance of the particularization requirement: to protect citizens from general warrants and writs of assistance as employed by the British against the colonists. *Boyd* v. *United States*, 116 U.S. 616, 624-627 (1886); *Marron* v. *United States*, 275 U.S. 192, 195-196 (1927). Clearly, it is the intent of the requirement to prohibit "general, exploratory rummaging in a person's belongings." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). However, as the dissent below points out, "none of the evils associated with searches under such warrants occurred." *Sheppard*, at 524 (Lynch, J., dissenting) (J.A. 76a). Nor was such the intent of the law enforcement officials as is objectively reflected by the specificity of their application. The warrant was not a general warrant in fact, it mistakenly but specially authorized a search for controlled substances.

[15] In the instant case, it is arguable that the police could have sought to rely upon the "exigent circumstances" to excuse them from the warrant require-

to deter unlawful searches by police, not mistakes by judges. Application of the exclusionary rule to deter judicial negligence is not compelled by any decision of the Court. This is not a case in which the judge participated in the investigation or execution of the search warrant, (compare *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326-328 (1979)), or lacked the requisite degree of neutrality, see *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). There is no claim that the issuing judge acted in any but a neutral and impartial manner.[16]

As the court below recognized, in a case involving no intentional misconduct,

> The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is neces-

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ment altogether. The police had a legitimate need to proceed with dispatch, the defendant was at liberty and could reasonably be expected to learn that he was under investigation, the items sought could easily be disposed of, and, it being a Sunday afternoon, a proper warrant form was unobtainable after good faith efforts were made to find one (Findings, J.A. 26a).

[16] The only constitutional requirement is that the issuing official be neutral and capable of assessing probable cause. See *Shadwick* v. *City of Tampa*, 407 U.S. 345, 348-350 (1972).

> sary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

Sheppard at 506 (J.A. 58a).

Suppression of highly relevant, reliable and probative evidence simply because a magistrate, rather than the "constable has blundered" (*People* v. *DeFore*, 242 N.Y. 13, 21 (1926) (Cardozo, J.)), exacts too costly a "toll upon the ability of courts to ascertain the truth in a criminal case." *United States* v. *Payner*, 447 U.S. 727, 734 (1980).

Since application of the exclusionary rule logically can have no deterrent effect either institutionally nor individually where there is no impermissible conduct by the police, there is simply no justification for excluding the evidence.

The good faith exception the Commonwealth requests the Court to establish under the facts of the instant case would not apply, nor does the Commonwealth suggest that it should apply, if the facts relied upon by the magistrate issuing a warrant "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Brown* v. *Illinois*, 422 U.S. at 610-611 (Powell, J., concurring), nor if the material presented to the magistrate was materially false or misleading, *Franks* v. *Delaware*, 438 U.S. 154 (1978). The exclusionary rule would remain applicable to those situations consistent with its historical underpinnings, *i.e.*, "flagrant and egregious" misconduct such as occurred in *Mapp* and *Weeks*.

The exception proposed by the Commonwealth would permit examination of the substantiality of the violation and the

police would still be denied the fruits of intentional or flagrant activity.[17] Examination of the police conduct would not turn on the subjective "good faith" of the officer, but upon the objective reasonableness of his actions.[18]

III. Applying a Totality of the Circumstances Test, the Search and Seizure in the Instant Case was Not Unreasonable and Therefore did Not Violate the Fourth Amendment.

As has been discussed above, and as the lower court acknowledged, the police conduct in conducting the search and seizure was objectively reasonable. The search was deemed to violate the Fourth Amendment because the warrant was technically defective in not satisfying the particularity requirement of the Warrant Clause of the Fourth Amendment.

However, the Amendment by its own terms does not require a finding that failure to meet the particularity requirement renders a search or seizure unconstitutional. The Amendment mandates, by its own terms, only that "unreasonable" searches and seizures are prohibited. This is the core prohibition of the Fourth Amendment. The Amendment further sets requirements for the issuance of a warrant. Warrants which issue, shall issue only "upon probable cause, and supported by Oath and affirmation, and particularly describing the place to be searched and the persons or things to be seized." Although the preference for a warrant is implicit, the Amendment itself

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[17] This test accords with the ALI's Model Code of Pre-Arraignment Procedure § SS290.2(2) (1975).

[18] The test would be similar in application to the good faith test applied in civil suits brought under 42 U.S.C. of 1983. See *Harlow* v. *Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2727 (1982).

does not define an unreasonable search as one conducted without a warrant. Nor does it require by its terms that a search conducted pursuant to a judicially issued warrant based upon probable cause, but failing to meet the particularity requirement, be deemed unreasonable. It has long been the rule that standards of reasonableness "are not susceptible of Procrustean application." *Ker* v. *California*, 374 U.S. 23, 33 (1963). Rather, "[e]ach case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931).

Given that it is the police intrusion which is the fundamental concern of the Fourth Amendment (*United States* v. *Calandra*, 414 U.S. at 345), proper determination of the reasonableness of the search should, it is suggested, focus on the intrusion itself and the proper test to be applied is the "totality of the circumstances" approach as recently enunciated in *Illinois* v. *Gates*, ____ U.S. ____, 103 S.Ct. 2317 (1983).

In *Gates*, this Court rejected the rigid "two-pronged test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969) in favor of a "totality of the circumstances" test for determining whether an informant's tip established probable cause for the issuance of a search warrant. Under this approach, it is submitted, the absence from the warrant itself of a particular description of the items to be seized should not, in and of itself, render the search unreasonable. Rather, focus should be had, on the fact that a warrant did in fact issue upon probable cause, supported by oath; that ample probable cause existed to search the particularly described premises, and that ample probable cause existed to support seizure of the items seized.[19] It may indeed be

[19] The latter circumstances go a long way toward dissipating the major concern underlying the particularity requirement, *i.e.*, the colonists' experience with writs of assistance issued on executive, not judicial, authority and unsupported by probable cause. See *Stanford* v. *Texas*, 379 U.S. 476 (1965); *Marron* v. *United States*, 275 U.S. 192 (1927).

that probable cause is a necessary prerequisite to Fourth Amendment reasonableness in the context of most searches. *E.g.*, *Carroll* v. *United States*, 267 U.S. 132 (1925); see also, *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). However, that component has been fully satisfied in the instant case.

In addition, focusing upon the intrusion itself, the search was, in fact, limited to items for which the police had requested authority to search. In approving the validity of a warrantless search of containers in an automobile, the Court reasoned: "The scope of the search was no greater than the magistrate could have authorized . . . [and in the instant case intended to authorize] . . . by issuing a warrant based on the probable cause that justified the search." *United States* v. *Ross*, 456 U.S. 798, 818 (1982).

The warrant in the instant case directed the search of the second floor and basement of 42 Deckard Street. It did not include the items listed in the affidavit but the form did describe drugs and drug paraphernalia (including marihuana, which was listed in the affidavit). Thus, the warrant was not a "general" warrant in the true sense, nor was it a "general" warrant issued upon less than probable cause. The analysis brought to bear in the warrantless automobile and container search cases is analogous.

Moreover, it is not clear that the case law requires that the particularity requirement be accorded "scrupulous exactitude" where the things to be seized do not implicate First Amendment protections. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

As the Court has acknowledged:

> The Fourth Amendment proscription against "unreasonable . . . seizures," applicable to the States through

> the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 471-472 (1971); *id.*, at 509-510 (Black, J., concurring and dissenting); *id.*, at 512-513 (White, J., concurring and dissenting).

Roaden v. *Kentucky*, 413 U.S. 496, 501 (1973).

Granted that the warrant is defective in failing to specify the seizure of the items listed in the affidavit for which probable cause for seizure had been found, it is submitted that this failure to technically comply with one aspect of the warrant clause does not render the search and seizure unreasonable and violative of the Fourth Amendment when viewed under the "totality of the circumstances." *Illinois* v. *Gates*, ____ U.S. ____, 103 S. Ct. 2317 (1983); *United States* v. *Ventresca*, 380 U.S. 102 (1965). This is especially the case where law enforcement was totally unresponsible for the error and took no advantage of it, and where no prejudice accrued to the defendant as a result of the defect. This is not to suggest any diminution in the historical importance of the particularity requirement, but to suggest that a negligent error involving none of the evils the requirement was designed to protect against should automatically render a search and seizure unreasonable and therefore violative of the Fourth Amendment.

Therefore, in the alternative to finding a reasonable good faith exception to the application of the exclusionary rule, the Commonwealth suggests that the Court should grant primacy to Fourth Amendment prohibition against "unreasonable" searches (See *Robbins* v. *California*, 453 U.S. 420, 437-444 (1981) (Rehnquist, J., dissenting) and should find under the

totality of the circumstances no Fourth Amendment violation.

Conclusion.

For the reasons stated above, it is respectfully submitted that the decision of the court below should be reversed.

Respectfully submitted,

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